No. 09-1509

SUPREME COURT, U.S.
JUL 9 - 2010

IN THE

# Supreme Court of the United States

COAST AUTOMOTIVE GROUP, LTD., *et al.*,

*Petitioners,*

*v.*

MERCEDES BENZ, U.S.A., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT DAVID MICHAEL MOTOR CAR CORP.

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## QUESTIONS PRESENTED

1. Whether expert testimony was properly excluded by the trial judge's proper *Daubert* analysis, eliminating the indispensable element of damages from Petitioners' case.

2. Whether Petitioners have abandoned any purported claim against Respondent David Michael Motor Car Corp.

## LIST OF PARTIES

The Petitioners Coast Automotive Group, Ltd. and Tamim Shansab are the Defendants/Counterclaimants/Third-Party Plaintiffs. The Respondents are Plaintiff/Counter-claim Defendant Mercedes Benz, U.S.A., and Third-Party Defendants David Michael Motor Car Corp.; Ray Catena Motor Cars Corp.; and Contemporary Motor Cars, Corp.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent David Michael Motor Car Corp. has no parent corporations, nor does any publicly held corporation have any interest in this respondent.

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## INTRODUCTION

The Petition for a Writ of Certiorari does not raise any question that merits review by the Supreme Court. The Third Circuit's decision does not conflict with any decision of any other court of appeals, nor does it conflict with any decision of this Court. Moreover, the Petition fails to identify any important unresolved question of federal law that needs to be addressed by this Court.

When their damage experts were barred by the trial judge, Petitioners' antitrust action was fatally stricken by their inability, as matter of law, to prove any damages. Not only do damages constitute one of the three distinct elements of a private antitrust action, but damages can be recovered only for injuries flowing from the wrongful anticompetitive conduct. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Thus, the preclusion of Petitioners' damage experts triggered summary judgment for Respondents, including David Michael Motor Car Corp. ("David Michael"). The trial court's *Daubert* analysis, sustained by the Third Circuit, flowed from well settled *Daubert* law. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

At its core, this matter is simple, involving a straightforward *Daubert*-based rejection of the reports and proffered testimony of Petitioners' proposed experts. Petitioners' convoluted quest to assert inconsistencies with precedent is, literally, incomprehensible. *Please see* Petitioners' characterization of "Questions Presented," in which they fail to even comprehend why judgment was entered against them.

Yet Petitioners' argument assumes an ability to present damages at trial, straining to contend that standards for summary judgment were breached. But Petitioners avoid the crux of the matter: Without admissible evidence of damages, the entry of summary judgment was appropriate for that very reason. By indirection, Petitioners pretend either that the two *Daubert* disqualifications did not occur, or that the disqualifications were error, or that the inability to prove damages could not trigger summary judgment. In all events, both courts below fully considered everything contended to them by Petitioners, and the decisions favorable to Respondents were properly grounded in uncontroversial law, applied to the specific facts.

On Petitioners' motion for reconsideration to the district court, the trial judge reiterated that he had found the Petitioners' expert reports "unreliable and inadmissible under *Daubert*." *See* Petitioners' Appendix B at 14a. He further recounted that "Finding the experts' reports inadmissible, this Court held that Coast could not establish damages associated with the alleged discriminatory allocation of automobiles." *See Id.* at 10a. For the same reason, judgment was also entered in favor of David Michael. *See* Petitioners' Appendix C at 60a.

The Third Circuit thereafter succinctly summarized how and why the trial court was correct:

> Given Markovitz's failure to independently verify Shansab's claims of unfair allocation or analyze Mercedes' allocation procedures, particularly where the facts belie the expert's

> conclusions, the District Court did not abuse its discretion in determining that Markovitz's opinion was unreliable for purposes of Rule 702. *See e.g.*, *Oddi v. Ford Motor Co.*, 234 F.3d 136, 156 (3d Cir. 2000) ("*Daubert* . . . require[s] more than [a] haphazard, intuitive inquiry"); *Elcock v. Kmart Corp.*, 233 F.3d 734, 755 (3d Cir. 2000) (expert opinion not grounded in facts of case is a "castle made of sand") (citing *Benjamin v. Peters Farm Condo Owners Ass'n*, 820 F.2d 640 (3d Cir. 1987)); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 762 (expert testimony based solely upon plaintiff's unverified self-report of injury was properly excluded).

*See* Petitioners' Appendix A at 4a. Because Petitioners' expert report by Dr. Del Roccili was "based on projected profits set forth in Markovitz's report," that too was properly deemed unreliable according to the Third Circuit. *See Id.* at 5a. The Third Circuit then concluded its analysis by reconfirming the necessity of proving damage as an element of an antitrust claim.

> In order to succeed on an antitrust claim, a plaintiff "must prove an antitrust violation, fact of damage or injury, and measurable damages." *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983); *see also Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980) ("plaintiff has the burden of proving that the established illegality was a material cause of the injury").

*See Id.* at 6a.

The decisions by the courts below are not at all controversial – certainly not worthy of any further review by this Court. Indeed, Petitioners seem to recognize the weaknesses of any challenge to the actual rulings, and they attempt, instead, to craft an assault upon an imaginary grievance wrapped in irrelevant platitudes about summary judgment standards. The trial judge described with precision how the two disqualified experts failed utterly to provide admissible damage evidence, and the Third Circuit agreed. Petitioners do not reasonably or responsibly address what the courts below did, and they "challenge" "issues" that are creative, but non-existent.

In addition to the foregoing, Respondent David Michael has separately asserted below, without contradiction, that there is no evidence to support any antitrust or other claim against it. The decisions below never reached the separate basis for a dismissal of the complaint as to David Michael (as it becomes moot), but it would nevertheless be an independent basis for judgment in David Michael's favor.

In all relevant respects, this is a case that should not be reviewed by the Supreme Court.

## COUNTERSTATEMENT

### A. Factual Background

The facts relevant to the Petition are set forth in two opinions of the trial judge. *See* Petitioners' Appendices B and C. For the sake of brevity, the district court's summaries of facts are incorporated herein by reference.

By way of specific emphasis, David Michael observes that the trial judge set forth at some length the reasons for disqualifying Petitioners' damage experts, Howard M. Markowitz and John A. Del Roccili. For example, extended pages of deposition testimony, quoted verbation in the opinion, demolish any rational notion that the proposed experts could or should have been permitted to offer trial testimony on damages. *See, e.g.*, Petitioners' Appendix C at 45a-53a.

The district court, after its lengthy recitation, summarized as follows:

> Here, Markowitz's and Del Roccili's opinions are based on nothing more than speculation and subjective belief in the truth of the assertions made by Shansab about unfair allocation without any factual basis for those conclusions. They are thus unreliable and inadmissible under Fed. R. Evid. 702. Because of the inadmissibility of these opinions, Coast defendants cannot establish damages associated with plaintiff's allegedly discriminatory allocation of automobiles. This failure to prove damages is fatal to Coast defendants' Counterclaims Five through Ten. [*Id.* at 52a-53a.]

### B. Proceedings Below

1. District court grants summary judgment, September 29, 2006.

2. District court denies motion for reconsideration, July 25, 2007.

3. Third Circuit affirms district court's decision, January 25, 2010.

4. Third Circuit denies rehearing and rehearing *en banc*, March 10, 2010.

### C. Adoption By Reference

Respondent David Michael Motor Car Corp. respectfully incorporates by reference the responsive arguments of other Respondents.

## REASONS FOR DENYING THE PETITION

### POINT I

### PETITIONERS RAISE NO SUBSTANTIAL QUESTION

The rulings below were clear, simple and direct: "Finding the experts' reports inadmissible, this Court held that Coast could not establish damages associated with the alleged discriminatory allocation of automobiles." Petitioners' Appendix at 10a. Petitioners do not meaningfully challenge the core finding that, without provable damages, there is no case. Since the

elements of a private antitrust action are (1) an antitrust violation, (2) antitrust injury, and (3) damages, the failure of an indispensable, element ends the case, as a matter of law. *See Associated General Contractors v. California State Council of Carpenters (AGC)*, 459 U.S. 519, 543-544 (1983) (no standing where the damage claim is speculative). Petitioners avoid any direct confrontation with the realities of the holdings below. Rather, starting with a convoluted three-page expression of "Questions Presented," they embark upon rambling and emotional essay on the unfairness of the entry of summary judgment. Among other things, they prominently cite and quote from articles in *The New York Times*, mention a Department of Justice investigation, and a settled class action, as if these inadmissible irrelevancies were evidence of something meaningful for this Court.

Throughout their brief, Petitioners run from the fundamental proposition that the element of damage is a *sine qua non* of their antitrust claim. *See Brunswick Corp.*, *supra*, 429 U.S. at 489. They contend that the courts below crafted a "new rule" applicable to damage experts, but the opinions of the district court and the Third Circuit apply only well settled principles, and the facts establish a withering rebuke to the proposed expert testimony which was woefully and obviously defective. They accuse the district court of "error in confusing liability and damages," but the trial judge had no such confusion as his thorough analysis of the experts' deficiencies demonstrates.

The district court merely indicated what is legally unassailable: *i.e.*, that without admissible proof of any damages, Petitioners had no case on which to proceed

to trial. No level of rhetoric from the Petitioners differentiates this case from the myriad lawsuits that fail as a matter of law when the damage element cannot be satisfied. *See, e.g., Eleven Line, Inc. v. N. Texas State Soccer Ass'n*, 213 F.3d 198, 209 (5th Cir. 2000) (damage assumptions that find no support in the actual facts of the case cannot support a verdict); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 806-807 (9th Cir. 1988) (rejecting expert's damage study which unreasonably projected that growth of sales would exceed forty percent annually while expenses would remain constant); *Olympia Equipt. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 382-383 (7th Cir. 1986) *cert. denied*, 480 U.S. 934 (1987) (rejecting expert damage study as pure speculation; "The record contains no basis for a rational estimation of Olympia's damages"); *Metrix Warehouse v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1044 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988) (expert damages study failed to separate out losses caused by lawful conduct); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1261-1263 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (no damages where plaintiff's projections required a great deal of speculation).

In short, Petitioners do not raise even the slightest issue of error for this Court, much less a substantial one. This is not a matter worthy of further review.

## POINT II

## THERE IS NO POLICY OR OTHER CONCERN THAT SHOULD PROMPT THE SUPREME COURT TO GRANT CERTIORARI.

Among other things, Petitioners make reference to articles in *The New York Times* and "the multi-year Department of Justice investigation that followed the *Times* article and the consumer class actions." It is a mystery to discern any conceivable value or propriety in these citations to wholly irrelevant matters that, in all events, produced no admissible (or even inadmissible) evidence below. The Justice investigation ended with no action taken. These assertions and arguments by Petitioners are revelatory only to the extent that they further expose the exceptional weakness of this application to the Supreme Court.

## POINT III

## THE RECORD SHOWS THAT THERE IS NO CLAIM AGAINST DAVID MICHAEL.

In addition to the decisions of the district court and Third Circuit which ruled definitively on the dispositive issue of damages, David Michael demonstrated below that there is no admissible evidence against it on any issue. The district court and the Third Circuit did not reach this question, as it was mooted by the dismissal of counts five through ten of Petitioners' counterclaim on the grounds that the fatal flaws in their experts' analysis precluded Petitioners' damage claims. If the Court were to review any aspect of this case, David Michael should be dismissed on the alternative grounds raised but not considered below.

## CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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